COUNTERSTATEMENT OF THE FACTS.

We find little fault with the summary, given by the defendant in his brief, of the testimony of the witnesses at the trial, but it will serve the interest of clarity to add a few remarks and observations.

The defendant, Nathel Jordan, lived at 417 Berkley Street, Camden.

The defendant has a brother. The name of the brother is Alpha Jordan. Alpha has a wife, Emma Ruth Jordan. Their marital abode was at 236 Royden Street, Camden.

The victim, Bertram Brown, lived at 711 Cherry Street, Camden, in an upstairs apartment consisting of a bedroom and kitchen.

From time to time Emma (wife of Alpha) lived with Brown in the latter's apartment at 711 Cherry Street, and at other times lived with her husband, at 236 Royden Street.

On March 9, 1968, Emma was living with Brown at 711 Cherry Street (T27-7). That night, or after midnight, and so on March 10, Emma and Brown were at a bar (T29-10). She left the bar alone, and went, not to 711 Cherry Street, but to 236 Royden Street, where her husband, Alpha Jordan, lived with her two children (T29-15). She left the front door of the house unlocked, and went upstairs, and was administering to her personal needs. Presently Brown entered the house, came upstairs, and although Emma had hooked the door upstairs Brown broke the the door in, cut her across the hip, and pulled her downstairs, because he did not want her to go with Alpha (her husband) or to his house (T30-1). Brown and she got in a car and went over to 711 Cherry Street (T30-25), that is, to Brown's apartment. There, by taking off some clothes, she convinced Brown that the cut had penetrated her clothing, and had cut her flesh (T31-15). Brown attempted to treat the wound, but, the bleeding continuing, Emma called the police, and they transported her to the hospital. There the

wound was dressed. She refused to sign a complaint against Brown (T33-6), and she was taken in the police car to 236 Royden Street (Alpha's, and so the marital, home). Alpha came down and opened the door, and he asked Emma what she was doing, getting out of a police car. A conversation ensued between Alpha and Emma, following which Alpha put his clothes on, said "Let's go," enforced his demand by striking Emma about the forehead (T34-10), and picked up a baseball bat that had been sprayed with silver paint (T34-19).

Alpha, thus armed with the bat, and Emma got in a car and went to Nathel's place on Berkley Street; Alpha rang the doorbell, Nathel came down; the two brothers had a conversation, and both got in the car. Emma was still in the car. They then went to 711 Cherry Street, the address where Brown had his apartment. There, Emma unlocked the downstairs door to the house, they went upstairs, and she also unlocked the door to Brown's apartment. Alpha was carrying the baseball bat (T38-1). Nathel was carrying a "silver" chain (T37-22). Emma did not know where he got the chain. Alpha and Nathel went into Brown's bedroom (T37-4), Emma went into the kitchen. Emma saw nothing of the events in the bedroom, but she heard "something sounding like a few licks, somebody being hit" (T38-14); "sounded like somebody being hit with a stick or something" (T38-24). She heard no outcries (T39-18). When Alpha and Nathel came out of the bedroom into the kitchen, Emma saw the baseball bat in Alpha's possession, and the chain in Nathel's possession (T41-9). When "we" came out, Nathel closed the door and took his handkerchief and wiped the doorknob off (T41-15), referring to the knob on the outside of the door to the apartment.

On leaving the premises 711 Cherry Street in the car, and while proceeding toward 236 Royden Street (Alpha's home), the car stopped along a street, and Nathel (the defendant) got out and broke the bat up (T42-20), and when they got to 236 Royden Street, they had the broken bat or

the pieces. Once there, Alpha went down in the cellar to put the bat in the furnace (T43-25), and Emma heard the furnace door open and close, and then he (Alpha) came back up (T44-25). After a few drinks at Alpha's place, the three went to Nathel's apartment on Berkley Street, and there they spent the greater part of the day drinking whiskey (T47-6 *et seq.*).

All the facts above given were elicited from Emma at the trial.

We consider it unnecessary for present purposes to review the testimony concerning the victim's condition after the attack upon him, the discovery of the man in his bedroom, and the later removal to the hospital, surgery, and death.

As to the chain carried by the defendant into and out of the victim's apartment, it was received in evidence, and although no verbal description of it can be found in the testimony, the Appellate Division spoke of it as an iron chain, and at the trial its length was indicated to be about 4 feet (T86-8). It was later found in Alpha's car.

ARGUMENT.

I.

The petition exhibits no special or important reason for the allowance of a writ of certiorari.

Rule 19 of the Rules of the Supreme Court of the United States declares that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The petition in the instant case exhibits no special reason or, indeed, any important reason, in the sense the words are used in the Rule, for the allowance of a writ.

On the reasoning implicit in the defendant's position, any error or supposed error committed in the course of a trial deprives the ostensibly aggrieved party of a fair trial, and so becomes an infringement of federal constitutional guaranties of due process and equal protection, thereby qualifying the error for review by the Supreme Court. In this assessment the selective process vanishes, and inundation follows.

Nor is the reason advanced by the petitioner in support of his application for a writ of certiorari of the character indicated by subparagraphs (a) and (b) of Paragraph 1 of Rule 19.

II.

The defendant was not deprived of a fair trial by reason of the fact that the trial court did not instruct the jury that although he might be guilty as an aider or abettor he was not necessarily guilty in the same degree as the principal actor; there was no occasion for such instruction, and the defendant did not request such instruction, and did not object to the absence of such instruction.

(a)

Although the defendant endeavors to invoke the federal jurisdiction by referring to the Sixth and Fourteenth Amendments of the Constitution of the United States, and appeals to the concepts of due process of law and equal protection of the law, and a fair trial as an essential element of both doctrines, he offers no specific instance of any transgression prejudicial to him. The only approach to a specific claim of grievance is contained in the statement in the second paragraph of page 9 of the brief of the defendant

(petitioner), that the "failure to instruct the jury that, although the petitioner may be guilty as an aider and abettor he is not necessarily guilty in the same degree as the principal actor." It will later be shown that there was nothing in the evidence to give relevance to such an instruction. The grievance has no more than an academic interest in this case.

(b)

The statute of New Jersey respecting aiders and abettors, N. J. S. A. 2A:85-14, reads as follows:

> "Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.
>
> Any person who wilfully causes another to commit a crime is punishable as a principal."

The statute of New Jersey prescribing the punishment for murder, N. J. S. A. 2A:113-4, reads as follows:

> "Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.
>
> Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years."

The single particular contention of the defendant (petitioner) supposedly rests upon a principle stated by the Supreme Court of New Jersey in *State v. Fair*, 45 N. J. 77, 95 (1965), in these words:

"While each participant may be guilty 'as a principal,' N. J. S. 2A:85-14, he is not necessarily guilty in the same degree. If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind."

(c)

At the trial of the instant case, the defendant made no request that the court charge the jury with respect to the possibility that he might be guilty, if at all, of a lesser degree of homicide than was the person who actually inflicted the fatal blows upon the victim, if indeed the jury found that it was not the defendant-petitioner himself who struck the blows, nor did the defendant at the trial raise any objection to the absence from the charge of any instruction of that kind. In fact, the defendant entered no objection or exception whatsoever to the charge, although invited to do so (T512-20).

Recently, in *State v. Macon*, 57 N. J. 325, decided January 25, 1971, the Supreme Court of New Jersey dealt with appellate review of questions not timely raised. There, the defendant also claimed violation of federal constitutional rights. In the following passage from the opinion in that case the court considered the views of the federal courts with respect to the need for timely objection in order to preserve the right of appellate review:

"The Federal Supreme Court has always recognized that a State has a substantial interest in requiring litigants to object timely so long as a fair opportunity is afforded to that end. Henry v. Mississippi, 379 U. S.

443, 452, 85 S. Ct. 564, 13 L. Ed. 2d 408, 415 (1965); Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); see O'Connor v. Ohio, 385 U. S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189 (1966). Hence even though the federal courts will permit a State defendant to raise constitutional issues for the first time in a federal proceeding, provided he did not deliberately bypass State procedures, Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963), yet Henry made it plain that the Federal Supreme Court did not wish 'even remotely [to] imply that the State must forego insistence on its procedural requirements.' 379 U. S. at 452, 85 S. Ct. at 570, 13 L. Ed. 2d at 415. Nothing in Chapman intimates a departure from Henry. In short, although Chapman is controlling in a State court review of a timely claim of error, it does not curtail the authority of the State court to decide whether or how to deal with a claim of error which was not timely. We have since Chapman continued to apply our approach to belated assertions of constitutional errors. State v. DiRienzo, 53 N. J. 360, 384 (1969); State v. Broxton, 49 N. J. 373, 388 (1967). For State cases elsewhere which since Chapman have also required a timely objection at the trial, see People v. Armstrong, 268 Cal. App. 2d 324, 74 Cal. Rptr. 37, 38 (1968); Robbins v. State, 242 N. E. 2d 925 (Ind. Sup. Ct. 1969); Thompson v. State, 6 Md. App. 50, 250 A. 2d 304, 307 (Ct. App. 1969); State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181, 184 (Sup. Ct. 1970). Indeed, as to federal trials, some federal cases since Chapman appear to deal as we do with a belated claim of error. See People of Territory of Guam v. Cruz, 415 F. 2d 336, 338 (9 Cir. 1969); Marshall v. United States, 409 F. 2d 925 (9 Cir. 1969); United States v. Baratta, 397 F. 2d 215, 227 (2 Cir. 1968), cert. denied, 393 U. S. 939, 89 S. Ct. 293, 21 L. Ed. 2d 276 (1968); Mims v. United States, 375 F. 2d 135 (5 Cir. 1967)."

Certiorari should be denied for the one reason alone, if for no other, that the defendant failed to request a charge on the proposition he would now advance, or for failure to enter an objection to the charge because of its supposed deficiency in regard to the absent instruction.

(d)

No evidence in the case warranted an instruction of the kind the defendant now contends should have been given by the trial court.

In the above Counterstatement of the Facts will be found all the evidence on the part of the State necessary for the consideration of the present question. We now give, for the same purpose, a comprehensive view of the evidence on the part of the defendant.

The defendant, Nathel Jordan, denied that he went with his brother, Alpha, or with his brother's wife, Emma, to 711 Cherry Street (where the victim lived and was attacked) (T321-23); denied that he entered the apartment with a chain (T321-25); denied that he wiped any blood off a doorknob (T322-2); denied that he carried a chain into the apartment at 711 Cherry Street (T322-14); denied that he had ever before seen the chain exhibited in evidence (T322-16); denied that he had ever gone to 711 Cherry Street with his brother, Alpha (T322-21), and denied that he knew Bertram Brown, the victim (T322-23). The defendant also testified as to his movements on the day of the assault, and so offered the defense of alibi. In short, then, the defendant by his testimony, if true, established that he had no part in the fatal assault upon Bertram Brown, and was in fact elsewhere at the time.

The State's evidence showed a concert of purpose on the part of the brothers Alpha and Nathel to confront Bertram Brown in the place where he lived, each armed with an instrument capable of inflicting great bodily injury, to

punish him for the wrongs he had done on Emma and for the breaking of the door in Alpha's home so that he (Brown) could get at Emma, as Emma had related to her husband, Alpha. "When the parties are bent on a joint criminal venture, they are all subject to N. J. S. A. 2A:85-14, the aiding and abetting statute, for any criminal act which is an incident of the mission." *State v. Humphreys*, 54 N. J. 406, 417 (1965). No division or difference of purpose or intent as between the two brothers is visible in the case. No evidence permits an inference that the defendant was actuated by a purpose less violent than that which possessed his brother. If the denials and alibi of the defendant were disbelieved, as certainly they were, then by no possibility under the evidence could the defendant have been regarded as other than the aider and abettor, in full parity, of his brother.

In 23A *C. J. S. Criminal Law*, §1190a, page 476, it is said: "However, instructions are required only on matters about which there is some issue to be presented to the jury." This rule of trial procedure, in the civil side as well as the criminal side, is too familiar to justify the citation of authorities.

Either the defendant was not guilty of any kind of unlawful homicide or he was guilty as an aider or abettor of his brother, and so was guilty as a principal. The jury did not believe the defendant's denials or his alibi. Nothing will be seen in the evidence that his participation in the fatal affair was of an intermediate quality or that he was present for any purpose but to aid his brother in imposing grievous bodily injury upon Brown, if not to kill him. In either event, regardless of who struck the fatal blows, both were equally guilty, for under such circumstances there is no distinction between principals and aiders and abettors. *State v. Riley*, 28 N. J. 188, 196 (1958); *State v. Jacques*, 99 N. J. Super. 230 (App. Div. 1968), affirmed 52 N. J. 481 (1968), cert. den. 395 U. S. 985 (1969).

As already observed, the defendant maintains that although he may be guilty as an aider or abettor, he was not necessarily guilty in the same degree as his brother. Nowhere, however, does he point to any evidence which permits an assessment of guilt of a lesser offense. Not only did he not raise the issue at the trial, but the possibility of such an issue under the evidence simply did not exist. The defendant's brief tenders no more than an exercise in the abstract. Either the defendant was not guilty of any kind of unlawful homicide or he was guilty as an aider or abettor of his brother (to give him the benefit of the most favorable view of the State's proofs), and so punishable as a principal for the murder of Bertram Brown.

The trial court quite fully and accurately instructed the jury on the several degrees of murder and on manslaughter, and also on the law of the State on aiding and abetting, and, as already said, no objection to the charge was entered by the defendant.

The defendant's present contention is based solely on a misunderstanding of *State v. Fair, supra*, 45 N. J. 77 (1965). In that case the court said, at page 95, "If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent." But that observation was made in the context of the facts of the case. There the evidence presented a question for the jury whether one of the defendants went to the defense of the other defendant from an onslaught by the victim. After a discussion of the right of one party to go to the defense of another, the court said, at page 93:

> "Applying these general principles to the facts herein, a jury may well have been justified in finding that Lynn became involved in the affray in order to defend Fair against what appeared to him to be the murderous onslaught of a drunken man wielding a knife. Whether such a mental state existed at all, and if so whether it was reasonably entertained, are necessarily

jury questions which cannot be determined by this Court. In any event, this question was so essentially involved *in the factual context* of this case that the trial court's failure to charge the jury on that issue sua sponte was nothing less than plain error requiring a reversal." (Emphasis added.)

In the case at hand no facts whatsoever will be found, as already stated, which would have afforded the jury an opportunity to find that the defendant participated in the assault upon Brown for any purpose that would alter or reduce the character of the crime, or legally differentiate it from the crime committed by his brother.

CONCLUSION.

For the reasons above given, the petition for writ of certiorari should be denied.

Respectfully submitted,

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On the Brief.

Dated, June 8, 1971.